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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-514

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners[1] pray that a writ of certiorari issue to review a judgment of the United States Court of Claims entered in the above entitled case on July 14, 1971.

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[1] The Petitioners are: The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, the Iowa Tribe of the Iowa Reservation in Oklahoma, and James Norris, Forrest Fee, Murray Campbell, Solomon Kent, Elwood Small, and Blaine Kent, appearing as the representatives and on the relation of the Iowa Tribe or Nation of Indians and as representatives and on behalf of all of the members thereof, The Sac and Fox Tribe of Indians of Oklahoma, The Sac and Fox Tribe of Missouri, Sac and Fox Tribe of the Mississippi in Iowa, and Edward Mack, Pauline Lewis, William Newashe, Charles W. Robidoux, John Connell, Dorothy Gilfillian, Thomas Green, Thomas Herrick, Kenneth Youngbear, Charles Davenport, Harry Lincoln, Albert Davenport, Edward Davenport, Percy Bear and Columbus Keahna, appearing as the representatives of and on the relation of the Confederated or United Tribes of Sac and Fox Indians and as representatives and on behalf of all of the members thereof.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims dated July 14, 1971, has not been reported. The slip opinion is printed at pages 162-167 in the separate appendix hereto. The opinion of the Indian Claims Commission from which the appeal to the Court of Claims was taken, as reported at 22 Ind. Cl. Comm. 232 (December 10, 1969), is printed at pages 73-161 of the separate appendix.

The first opinion of the Court of Claims in this proceeding, as reported at 179 Ct. Cl. 8, 383 F.2d 991 (March 17, 1967), is printed at pages 49-72 of the separate appendix. The petition for writ of certiorari in respect of that decision was denied by the Court, 389 U.S. 900, 88 S. Ct. 212, 220, 19 L.Ed. 2d 217 (October 16, 1967). The opinion of the Indian Claims Commission from which the first appeal to the Court of Claims was taken, as reported at 6 Ind. Cl. Comm. 464 (July 2, 1958), is printed at pages 1-48 of the separate appendix.

The decisions of the Indian Claims Commission with respect to damages and offsets, as reported at 12 Ind. Cl. Comm. 487 (August 29, 1963) and 15 Ind. Cl. Comm. 248 (May 7, 1965), are not reproduced because they are not pertinent to the issues raised by this Petition.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 14, 1971. The jurisdiction of the Court is invoked under Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. § 70s(c) and 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the intent of the Congress in enacting the Indian Claims Commission Act and in providing for the hearing and determination of all Indian claims against the United States is being carried out if meritorious land claims are denied recovery on technical legal grounds?

2. Whether Indian tribes should be permitted recovery under the Indian Claims Commission Act for lands jointly possessed but denied recovery when lands are possessed in common by such tribes or when permission to use such lands is granted to another tribe?

3. Whether the Court of Claims was correct in treating the opinion of the Indian Claims Commission as meeting the statutory requirement that the Commission make findings of fact when the Commission has stated that it has made no findings of fact?

STATUTES AND TREATIES INVOLVED

The statutory provisions and the treaties involved in this case are Sections 2, 19 and 20 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, *et seq.*, 1946, 25 U.S.C. §§ 70a, 70r and 70s, and two treaties of August 4, 1824, 7 Stat. 229 and 7 Stat. 231, with the Sac and Fox and Iowa Nations, respectively. The statutory provisions and the treaties are printed in Appendix A to this Petition at pages 20-29.

STATEMENT OF CASE[1]

This case involves claims asserted by Petitioners under the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049, 25 U.S.C. § 70 *et seq.*) to recover compensation for lands which the Sac and Fox and Iowa Nations formerly used and occupied north of the Missouri River in the present State of Missouri, and which they ceded to the United States by two treaties concluded in 1824 (7 Stat. 229; 7 Stat. 231; App. A, pp. 24-29). The location of these lands and other pertinent information are shown on the map which appears at the end of the opinion of the Court of Claims which was rendered on the first appeal to that court (Sep. App. 72) and which is reproduced as Appendix B to this Petition (p. 30).

Early in the 18th century, the Missouria Indians and their guests, the Little Osage, used and occupied portions of the lands, including the unawarded area, claimed by the Sac and Fox and Iowa Nations north of the Missouri River. Commencing in the 1720's, this usage was challenged by the Sac and Fox Nation and in 1775, the Sac and Fox, with their allies the Iowa, forced the Missourias and Little Osage to abandon their villages along the lower Missouri River. A number of years later an Osage spokesman stated that the Osage claimed no lands north of the Missouri River

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[1] The following abbreviations or definitions are sometimes used in this Petition:

Act	—Indian Claims Commission Act
App.	—Appendix which is a part of this Petition
Sep. App.	—Separate appendix to this Petition in which the opinions of the Commission and the Court of Claims are printed.
Ct. Cl. App.	—Appendix to Brief of Petitioners before the Court of Claims.
Commission	—Indian Claims Commission
Unawarded area	—The land area in northern Missouri as to which recovery was denied by the Commission.

(Sac and Fox Exhibit 67, Ct. Cl. App. 227). Commencing prior to 1775 and after that date, the Sac and Fox and Iowa together used, occupied and claimed the unawarded lands in northern Missouri.[1]

In another case (*Osage Nation of Indians* v. *United States*), 11 Ind. Cl. Comm. 733 (December 3, 1962), the Commission found that the Osage did not have Indian title as of 1803 or 1808 to any lands north of the Missouri River, and that any Osage usage of those lands after 1775 was confined to a narrow fringe area along the Missouri River (11 Ind. Cl. Comm. 733, 756, 808-809). In the present case, Respondent agreed with Petitioners that after 1775 neither the Missourias nor the Little Osage used or occupied the unawarded area and proposed the following finding in the second proceeding before the Commission on the question of title:

> "3a. The Missouria Indians, who once occupied a portion of Cession 69 [the lands north of the Missouri River], abandoned their villages within the area prior to 1775 and moved westward where they joined with the Otoe Indians. At no time after 1775 did the Missouria return to or occupy any part of Cession 69. The Osage Indians at one time used portions of Cession 69 by permission of the Missouria Indians, however, the Osage never at any time claimed Indian title to any lands north of the Missouri River." (Respondent Brief p. 26, Ct. Cl. App. 187).

In its brief to the Commission in support of its proposed finding, Respondent stated:

> "Defendant contends that the record conclusively shows that no other Indian tribes either claimed or occupied

[1] The entire claimed area is sometimes referred to in the decisions of the Commission and the Court of Claims as Cession 69 or Area 69, which is the designation used by Royce in his mapping of Indian land cessions (Map 1, 18th Annual Report of the Bureau of American Ethnography, 1896-1897, Part II, Indian Land Cessions in the United States).

> any part of Cession 69 after 1775; therefore, there could have been no *changes* in Indian title whereby petitioners acquired by conquest, purchase or exchange the lands of another Indian tribe between 1803 and 1824." (Respondent Brief p. 24, Ct. Cl. App. 186).[1]

In its initial decision in this case, the Indian Claims Commission (6 Ind. Cl. Comm. 464 (1958), Sep. App. 1), found that the Iowa Nation had Indian title to a tract of land in the northwest corner and the Sac and Fox Nation to a tract of land in the northeast corner of the area claimed in northern Missouri, and that neither tribe owned a much larger land area (the unawarded area) which was located in the center of the claimed lands and along the Missouri River (6 Ind. Cl. Comm. 464, 482, 493, Sep. App. 20, 31).

In reaching its decision as to title, the Commission held that the Iowa and Sac and Fox Nations were required to establish their Indian title to the claimed lands as of the date when the United States acquired sovereignty over the area, namely, 1803 (the date of the Louisiana purchase), and that the two tribes could not enlarge upon their title after that date (6 Ind. Cl. Comm. 464, 502, Sep. App. 39). The Commission's findings of fact were therefore confined to the evidence of Sac and Fox and Iowa use and occupancy in the period prior to 1803. On the first appeal to the Court of Claims, the Court of Claims reversed this holding of the Commission and held that the only significant date was 1824 when the lands were ceded to the United States (179 Ct. Cl. 8, 23, 383 F. 2d 991, 999, Sep. App. 63-64). The Court of Claims remanded the case to the Commission for its consideration of Indian title evidence between 1803 and 1824, pointing out that that evidence "when connected with use

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[1] Respondent attempted to avoid the effect of this concession by contending that after 1775 the unawarded area was vacant, that is, not used or occupied by the Iowa, Sac and Fox, or any other Indian tribe.

and occupancy immediately prior to 1803, could well have been use and occupancy 'for a long time' and sufficient to constitute Indian title to the land." (179 Ct. Cl. 8, 23, 383 F. 2d 991, 999, Sep. App. 65).

On December 10, 1969, the Commission rendered its second opinion in these proceedings concerning Sac and Fox and Iowa title (22 Ind. Cl. Comm. 232, Sep. App. 73). The Commission made no additional findings of fact with respect to the evidence of Sac and Fox and Iowa use and occupancy of the unawarded lands during the period 1803 to 1824. The Commission stated:

> "The Commission makes no additional findings of fact. Instead for the most part we shall limit our discussion to evidence previously alluded to, especially that cited by the plaintiffs in their appeal brief before the Court of Claims." (22 Ind. Cl. Comm. 232, 237, Sep. App. 78)

The Commission held that Petitioners had failed to establish Indian title to the unawarded lands (22 Ind. Cl. Comm. 232, 328, Sep. App. 159).

Commissioner Vance dissented from the Commission's opinion. He was of the opinion that there was substantial evidence to support findings that the Iowa and Sac and Fox had Indian title to the lands which each tribe claimed and that the Iowa and Sac and Fox were a single identifiable group which "had Indian title to all" of the claimed lands (22 Ind. Cl. Comm. 232, 329, Sep. App. 159). Commissioner Vance further said: "In the majority opinion, all of the doubts are resolved against the plaintiffs." He expressed the opinion that—

> " . . . the majority has acknowledged the existence of substantial evidence supporting the claims of the plaintiff tribes and has by its long and well documented

opinion refused to consider that evidence supporting the claim." (22 Ind. Cl. Comm. 232, 330, Sep. App. 160)

Petitioners again appealed from the Commission's decision to the Court of Claims. The errors raised on appeal include: the refusal of the Commission to make additional findings of fact as required by the Indian Claims Commission Act; the inconsistencies between the Commission's decision and its findings and opinions in other cases involving the same Petitioners or the same issues; the Commission's legal holdings that the Sac and Fox and Iowa Nations could not have joint Indian title to the unawarded area, that the two tribes could not acquire Indian title to lands used in common, and that the granting by one tribe of permission to another tribe to use its lands would prevent it from acquiring Indian title to those lands. Petitioners also contended that the Commission's opinion was not supported by and was contrary to substantial evidence because of its mistakes in construing the evidence which it considered, and of its failure to consider substantial relevant evidence.

The Court of Claims did not for the most part consider the errors which Petitioners raised on appeal. In affirming the Commission's decision, the Court of Claims treated the Commission's opinion as the equivalent of findings of fact and the issues raised on appeal as involving only factual questions (Sl. Op. pp. 2-3, Sep. App. 164).

REASONS FOR ALLOWING THE WRIT

The Indian Claims Commission Act is a broad remedial statute which provides for the hearing and determination of all Indian claims against the United States.

Following the passage of the Act, Congressman Mundt, in an extension of remarks on July 30, 1946 (Appendix to the Congressional Record A4923) stated:

> "Mr. Speaker, the passage of the Indian Claims Commission bill, H.R. 4497, by the Congress represents a great landmark in our treatment of the American Indians. By this bill the United States, as a sovereign Nation, consents that it shall be subject to suit by any Indian tribe not only upon claims that arise in law or equity under the Constitution, but also upon claims not recognized by any existing rule of law or equity, which have as their bases unfair and dishonorable dealings on the part of the United States. In other words, if any Indian tribe can prove that it has been unfairly and dishonorably dealt with by the United States it is entitled to recover. This ought to be an example for all the world to follow in its treatment of minorities."

See also *Otoe and Missouria Tribe* v. *U.S.*, 131 Ct. Cl. 593, 601-609, 131 F. Supp. 265, 271-275 (1955), *cert. den.* 350 U.S. 848, 76 S. Ct. 82, 100 L. Ed. 755 (1955).

Most of the claims asserted under the Indian Claims Commission Act arise out of transactions in which Indian tribes sold or lost their lands to the United States. Many of these claims are still pending before the Indian Claims Commission. The decisions of the Indian Claims Commission and the Court of Claims in this case bar consideration of meritorious land claims based on technical legal distinctions and therefore are contrary to the intent of the Congress that all Indian claims against the United States shall be heard and determined. The questions which are presented concern the proper administration and interpretation

of the Indian Claims Commission Act in accordance with the Congressional objectives and are therefore of substance and importance. The failure of the Indian Claims Commission to make findings of fact is contrary to the statutory requirement of the Indian Claims Commission Act and precludes effective review of the Commission's decision. None of the questions presented by this Petition has been decided by the Court.

I.

The Indian Claims Commission Act Has Not Been Administered And Interpreted In Accordance With The Intent Of Congress That All Indian Claims Against The United States Shall Be Heard And Determined.

The Indian Claims Commission and the Court of Claims have developed a definition of Indian title which limits and discriminates as to the type of land claims which are recoverable under the Indian Claims Commission Act. Although the Act is concerned with all kinds of claims, legal, equitable and moral, and does not require that land claims be based upon a particular concept of title or a particular type of interest in land, the Commission and the Court of Claims have determined that recovery under the Act is permissible only in those cases in which an Indian tribe has established either "recognized title" or "Indian title" to its lands, as those terms have been judicially and administratively defined.[1] As a consequence, various Indian claims which are based upon the use and possession of lands and which meet historical standards of Indian land ownership will be denied recovery under the Act.

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[1] Neither phrase appears in the Indian Claims Commission Act. The jurisdictional section (Sec. 2, 25 U.S.C. § 70a, App. A, pp. 20-21) is concerned with all "claims" and not with particular estates in lands.

An Indian tribe's title is recognized when it has been acknowledged by a treaty or other formal act of the United States; that kind of title is not involved in this case. Indian title has been defined by the Court of Claims in this manner (*Confederated Tribes of Warm Springs Reservation v. U.S.*, 177 Ct. Cl. 184, 194 (1966)):

> "There must be a showing of actual, exclusive[8] and continuous use and occupancy 'for a long time' prior to the loss of the land. *Sac and Fox Tribe of Oklahoma* v. *United States*, 161 Ct. Cl. 189, 315 F. 2d 896, cert. den. 375 U.S. 921 (1963) . . ."
>
> [8] Joint and amicable possession of the property by two or more tribes or groups will not defeat 'Indian title'."

There is substantial evidence in the record that the Iowa and Sac and Fox actually and continuously and together exclusively used the unawarded lands in northern Missouri for a long time. In the present case, each tribe recovered with respect to an isolated area which the Commission found in its original opinion the tribe used and occupied to the exclusion of all other Indian tribes (6 Ind. Cl. Comm. 464, 482, 493, Sep. App. 20, 31). Recovery was denied with respect to a large area (the unawarded lands) which is located between these two parcels. The Commission and the Court of Claims held, as a matter of law, (i) that two Indian tribes such as the Iowa and Sac and Fox cannot acquire Indian title to lands used in common by both tribes, and (ii) that the granting by one tribe of permission to another tribe to use its land prevents the granting tribe from perfecting its Indian title to that land. The reason given in support of those holdings is that the exclusivity requirement for Indian title is not met (22 Ind. Cl. Comm. 232, 278-282, 321-322, 326; Sep. App. 115-118, 153, 157; Sl. Op. p. 5, Sep. App. 166-67).

The footnote quotation from *Warm Springs* set forth above indicates that Indian title can be acquired by "joint and amicable possession" of lands by two tribes. However, the Commission interprets the word "joint" to require possession of land by two or more tribes which are so closely integrated as to constitute a single political entity (22 Ind. Cl. Comm. 232, 278-282, Sep. App. 115-118). Although the Sac and Fox and Iowa Nations acquired the unawarded lands by joint action and thereafter used, occupied and claimed those lands, the two tribes continued to be separate political entities and therefore could not, in the opinion of the Commission, be considered joint possessors of the unawarded lands for the purpose of acquiring Indian title to them. Although the Court of Claims stated that "we have never purported to define the specific circumstances in which [joint title] could or would occur" the Court accepted this holding of the Commission (Sl. Op. p. 5, Sep. App. 166).

Presumably, the purpose of the words "actual," "continuous," "exclusive use and occupancy", "for a long time" in the current definition of Indian title is to establish criteria by which the evidence (including conflicting evidence) of Indian land ownership may be evaluated. Certainly the definition should not be transformed into an artificial system of Indian land tenure in which the historic facts of Indian land occupancy and contemporaneous attitudes as to Indian land ownership become irrelevant and are replaced by a rigid and inflexible legalistic formula. Yet this is what has occurred. Some types of Indian land occupancy result in recoverable claims under the Indian Claims Commission Act and other types of occupancy do not, notwithstanding that the only distinction is legal and technical in character.

In the present case, the Iowa and Sac and Fox Nations could have acquired Indian title to the unawarded lands as joint tenants but they could not as tenants in common.[1] Whether the two tribes are joint owners or owners in common of the unawarded lands, the historical facts of actual, continuous, exclusive use and occupancy for a long time are the same. The only distinction is that if the Iowa and Sac and Fox are tenants in common then their usage is not exclusive of each other, but if the two tribes merged to form a single entity, their title is joint and the exclusivity test is passed.

The distinction which this rule of law establishes renders irrelevant the actual historical facts of Indian land use whenever that usage is in common by two tribes, however appealing and meritorious those circumstances may be. In the present case, the Sac and Fox and Iowa, as allies, completed the ouster of the prior Indian occupants from northern Missouri in 1775. The two tribes subsequently used, occupied and claimed ownership of these lands down to 1824 when the two tribes by nearly identical treaties ceded their interests in these lands to the United States. Ownership of the lands in northern Missouri was not in dispute between the Iowa and Sac and Fox Nations and no contemporaneous claim of ownership was asserted by any other tribe to that area. The two tribes filed a single petition under the Indian Claims Commission Act in which

[1] However, Indian tribes may recover with respect to lands used in common if they have recognized title to those lands (*Otoe and Missouria Tribe* v. *United States*, 5 Ind. Cl. Comm. 316 (1957), 13 Ind. Cl. Comm. 272 (1964), 15 Ind. Cl. Comm. 172 (1965). This distinction between recognized title and Indian title situations is without statutory basis and has nothing to do with the facts of Indian land usage.

they sought a determination of their respective interests in the claimed lands.[1]

As was the custom among many Indian tribes, each tribe, as close friends, freely granted permission to members of the other tribe to use its lands. These permissive land use arrangements between the Iowa and Sac and Fox, which were wholly compatible with contemporaneous concepts of Indian land use and ownership, had unfortunate connotations for their claims under the Act.

The Commission held also that the granting by either tribe of permission to another tribe to use its lands prevented the granting tribe from acquiring Indian title to its lands (22 Ind. Cl. Comm. 232, 279, Sep. App. 116). Its reason is that the granting tribe's use of its lands would not be exclusive if another tribe was permitted to use them. This holding is all the more puzzling because the Commission acknowledges that a tribe which has perfected Indian title to lands may grant permission to another tribe to use those lands without destroying its Indian title. That a tribe must seek permission to use lands occupied by another tribe and that tribe may grant or withhold such permission

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[1] When two tribes are friendly allies, the evidence available today may not be sufficient to establish with certainty a boundary line between their respective lands. If a present inability to locate a boundary line leads to the conclusion that the lands in question must be considered as being used in common it should not also lead to the legal conclusion that recovery under the Act for those lands is therefore barred. In the present case, one of the grounds for denying recovery for the unawarded lands was the absence of a now identifiable boundary line between the lands of Iowa and the lands of the Sac and Fox Nation (22 Ind. Cl. Comm. 232, 247 (1969), Sep. App. 87), notwithstanding that Petitioners had offered proof and expert testimony as to the probable location of such line, and that the Commission had been able to determine such a boundary line with respect to lands in Iowa immediately to the north of the unawarded area (*The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.* v. *United States,* 7 Ind. Cl. Comm. 98, 113 (1959)).

constitutes some of the best historical proof of land ownership. This evidence is equally impressive and relevant whether the permissive use arrangement occurs prior or subsequent to the date when Indian title is perfected.

The Indian Claims Commission Act contains no requirement that claims relating to lands be limited to those lands which were "exclusively" occupied by an Indian tribe "for a long time". The Sac and Fox and Iowa Nations should be entitled to recover the value of their possessory interests in the unawarded lands irrespective of whether those interests are considered the equivalent of Indian title as defined by the Commission and the Court of Claims.[1] However, if the concept of Indian title is to be retained as a means of determining Indian land claims cognizable under the Indian Claims Commission Act, then a claim should not be rendered wholly valueless merely because a tribe's title may be subject to an imperfection. At the least, the tribe should be entitled to recover the fair value of such lands reduced by the value of any title flaw.

The holdings of the Commission and the Court of Claims that Indian tribes can recover under the Indian Claims Commission Act if they have joint possession of lands but not if they possess the lands in common, and that permissive land use arrangements defeat Indian title if entered into prior to the time that Indian title is perfected but are proper after Indian title has been acquired, represent a formalistic approach to claims under the Indian Claims Commission Act which is reminiscent of the technical rules which defined the various estates in land under ancient Anglo-Saxon land tenure. Such an approach has no place in the interpretation of the Indian Claims Commission Act

[1] Such values are determined as of the date the lands are ceded to the United States. Interest is allowed only in the rare case of a constitutional taking and is not recoverable in the present case.

and results in the denial of meritorious claims and is contrary to the intent of the Congress that all Indian claims shall be heard and determined under the Act.

II.

The Failure Of The Indian Claims Commission To Make Findings Of Fact Was Contrary To Law And Precluded Petitioners From Obtaining An Effective Review Of Its Decision.

In the first opinion on title (6 Ind. Cl. Comm. 464, Sep. App. 1), the Commission's findings of fact were concerned with the period prior to 1803, the date of the Louisiana purchase. On the first appeal, the Court of Claims reversed and remanded the case to the Commission "for its consideration of Indian title evidence between 1803 and 1824, . . . " (179 Ct. Cl. 8, 23, 383 F. 2d 991, 999, Sep. App. 65).

On remand, the Commission made no additional findings of fact (22 Ind. Cl. Comm. 232, 237, Sep. App. 78). Its final determination therefore did not comply with Section 19 of the Indian Claims Commission Act which provides:

> "The final determination of the Commission shall be in writing . . . shall include (1) its findings of the facts upon which its conclusions are based; . . . and (3) a statement of its reasons for its findings and conclusions." (Sec. 19, 60 Stat. 1054, 25 U.S.C. 70r, App. 22)

On appeal, the Court of Claims must determine whether the Commission's findings of fact are supported by substantial evidence and whether its conclusions of law are valid and are supported by the Commission's findings of fact (Sec. 20, 60 Stat. 1054, 74 Stat. 829, U.S.C. § 70s, App. 22). In the present case, the Court of Claims held that the Commission had made the review contemplated by its order of remand and that its opinion "in effect constituted

its new factual findings" (Sl. Op. p. 2, Sep. App. 164). But this assumption of the Court of Claims is denied by the Commission. The disclaimer of the Commission is explicit:

> "The Commission makes no additional findings of fact. Instead for the most part we shall limit our discussion to evidence previously alluded to, especially that cited by the plaintiffs in their appeal before the Court of Claims." (22 Ind. Cl. Comm. 232, 237, Sep. App. 78)

The Commission's opinion does not even purport to address itself to the entire record; it is limited to a discussion of only some of the evidence. Moreover, the Commission's opinion does not approach the preciseness of expression required of findings of fact. Because it did not subject itself to the discipline of making findings of fact, the Commission in its opinion frequently does not come to grips with the evidence—it merely discusses some of the possibilities. Its opinion is sprinkled with catch words and phrases such as "most probable," "possibly," "problematical," "conceivably," "allegedly," and "ostensibly" (See 22 Ind. Cl. Comm. 251, 253, 257, 258, 267, 289, 293, 302, 303, 304, 311, 312, 313, 318; Sep. App. 90, 92, 95, 96, 105, 125, 128, 136, 137, 138, 144, 145, 149-150). Such tentative, alternative and vague conclusions should not be considered as the equivalent of findings of fact. (*Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, 93-94, 63 S. Ct. 454, 462, 87 L. Ed. 628, 636, (1943)).

The reasons for requiring administrative findings have been often expressed and are powerful and compelling. Clear and specific findings are essential in the facilitation of judicial review. (*B. & O. Railroad Co.* v. *Aberdeen & Rockfish Railroad Co.,* 393 U.S. 87, 93, 89 S. Ct. 280, 21 L. Ed. 2d 219 (1968); reh. den. 393 U.S. 1124, 89 S. Ct. 987 22 L. Ed. 2d 131 (1969); *National Geographic Society*

v. *District Unemployment Comp. Bd.*, 438 F. 2d 154, 158 (App. D.C. 1970)) The need for findings is especially great in a case such as the present one where there are quantities of historical evidence to consider. The reviewing court has to know what findings of fact were made by the Commission in order to determine whether those findings are sustained by the evidence and whether the Commission's decision is right or wrong. (2 Davis, K., *Administrative Law Treatise*, § 16.05, 16.09 (1958); 1970 Supp. §16.00) Here, the Court of Claims concluded that the Commission's determination was reasonable and supported by substantial evidence in the whole record (Sl. Op. p. 4, Sep. App. 165). Yet the Court of Claims' own view of the evidence was that it is "neither sharp nor decisive, nor overwhelmingly one way . . ." and that "From the appellants' viewpoint, the best that can be said is that their interpretations of the evidence are likewise reasonable." (Sl. Op. pp. 3-4, Sep. App. 165). As the Court of Claims pointed out, "appellants disagree vigorously with most of [the Commission's] reading and evaluations, . . ." (Sl. Op. p. 3, Sep. App. 165).

In his dissent to the Commission's decision, Commissioner Vance expressed the opinion that there was substantial evidence to support findings that the Iowa and Sac and Fox Indians had Indian title to the unawarded land or had joint Indian title to the entire area, and that "in the majority opinion all of the doubts are resolved against the plaintiffs . . . " (22 Ind. Cl. Comm. 232, 330, Sep. App. 159).

Although Petitioners wholeheartedly agree with the dissenting opinion expressed by Commissioner Vance, if the present case is one which is close and could be decided either way, then clearly this is a case in which it is imperative that the statutory requirement for findings of fact be followed. As Judge Frank observed "Often a strong im-

pression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." (*United States* v. *Forness,* 125 F. 2d 928, 942, *cert. den.* 316 U.S. 694, 62 S. Ct. 1293, 86 L.Ed. 1764 (1942)).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari to the Court of Claims be allowed.

Respectfully submitted,

George B. Pletsch,
Attorney of Record for Petitioners and Counsel for The Sac and Fox Tribe of Indians of Oklahoma, et al.

Lawrence C. Mills,
Counsel for Sac and Fox Tribe of the Mississippi in Iowa, et al.

Stanford Clinton,
Counsel for The Sac and Fox of Missouri, et al.

Nicholas Conover English,
Counsel for The Iowa Tribe of the Iowa Reservation in Oklahoma, et al.

Brian Sullivan,
Counsel for the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.

APPENDIX A

Sections 2, 19 and 20, Indian Claims Commission Act, 60 Stat. 1049, et seq., 25 U.S.C. §§ 70a, 70r and 70s

§ 70a. *Jurisdiction; claims considered; offsets and counterclaims.*

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466—470, 471—473, 474, 475, 476—478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award. (Aug. 13, 1946, ch. 959, § 2, 60 Stat. 1050.)

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§ 70r. *Final determinations of Commission.*

The final determination of the Commission shall be in writing, shall be fi'.d with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions. (Aug. 13, 1946, ch. 959, § 19, 60 Stat. 1054.)

§ 70s. *Review by Court of Claims and Supreme Court.*

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final

as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided,* That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28. (Aug. 13, 1946, ch. 959, § 20, 60 Stat, 1054; Sept. 8, 1960, Pub. L. 86-722, 74 Stat. 829.)

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TREATY WITH THE SOCK AND FOXES, AUGUST 4, 1824, 7 STAT. 229

To perpetuate peace and friendship between the United States and the Sock and Fox tribes or nations of Indians, and to remove all future cause of dissensions which may arise from undefined territorial boundaries, the President of the United States of America, by William Clark, Superintendent of Indian Affairs, and sole Commissioner specially appointed for that purpose, of the one part, and the undersigned Chiefs and Head Men of the Sock and Fox tribes or nations, fully deputized to act for and in behalf of their said nations, of the other part, have entered into the following articles and conditions, viz:

ARTICLE 1st. The Sock and Fox tribes or nations of Indians, by their deputations in council assembled, do hereby agree, in consideration of certain sums of money, &c. to be paid to the said Sock and Fox tribes, by the Government of the United States, as hereinafter stipulated, to cede and forever quit claim, and do, in behalf of their said tribes or nations, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim, to the lands which the said Sock and Fox tribes have, or claim, within the limits of the state of Missouri, which are situated, lying, and being, between the Mississippi and Missouri rivers, and a line running from the Missouri, at the entrance of Kansas river, north one hundred miles to the Northwest corner of the state of Missouri, and from thence east to the Mississippi. It being understood, that the small tract of land lying between the rivers Desmoin and the Mississippi, and the section of the above line between the Mississippi and the Desmoin, is intended for the use of the half-breeds belonging to the Sock and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held.

Article 2d. The Chiefs and Head Men who sign this convention, for themselves and in behalf of their tribes, do acknowledge the lands east and south of the lines described in the first article, so far as the Indians claimed the same, to belong to the United States, and that none of their tribes shall be permitted to settle or hunt upon any part of it, after the first day of January, 1826, without special permission from the Superintendent of Indian Affairs.

Article 3d. It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the claims and lands ceded by the Sock and Fox tribes in the first article, there shall be paid to the Sock and Fox nations, within the present year, one thousand dollars in cash, or merchandize; and in addition to the annuities stipulated to be paid to the Sock and Fox tribes by a former treaty, the United States do agree to pay to the said Sock tribe, five hundred dollars, and to the Fox tribe five hundred dollars, annually, for the term of ten succeeding years; and, at the request of the Chiefs of the said Sock and Fox nations, the Commissioner agrees to pay to Morice Blondeau, a half Indian of the Fox tribe, the sum of five hundred dollars, it being a debt due by the said nation to the aforesaid Blondeaux, for property taken from him during the late war.

Article 4th. The United States engage to provide and support a Blacksmith for the Sock and Fox nations, so long as the President of the United States may think proper, and to furnish the said nations with such farming utensils and cattle, and to employ such persons to aid them in their agriculture, as the President may deem expedient.

Article 5th. The annuities stipulated to be paid by the 3d article, are to be paid either in money, merchandise, provisions, or domestic animals, at the option of the aforesaid tribes, and when the said annuities or part thereof is paid

in merchandise, it is to be delivered to them at the first cost of the goods at St. Louis, free from cost of transportation.

ARTICLE 6th. This treaty shall take effect and be obligatory on the contracting parties so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

In testimony whereof, the said William Clark, commissioner as aforesaid, and the chiefs and head men of the Sock and Fox tribes of Indians as aforesaid, have hereunto set their hands, at Washington City, this fourth day of August, in the year of our Lord one thousand eight hundred and twenty-four.

William Clark, [L.S.]
Socks:
Pah-sha-pa-ha, or Stubbs, his x mark, [L.S.]
Kah-kee-kai-maik, or All Fish, his x mark, [L.S.]
Wash-kee-chai, or Crouching Eagle, his x mark, [L.S.]
Kee-o-kuck, or Watchful Fox, his x mark, [L.S.]
Kah-kee-kai-maik, or All Fish, his x mark, [L.S.]
Sah-col-o-quoit, or Rising Cloud, his x mark, [L.S.]
Foxes:
Fai-mah, or the Bear, his x mark, [L.S.]
Ka-pol-e-qua, or White Nosed Fox, his x mark, [L.S.]
Pea-mash-ka, or the Fox winding his horn, his x mark, [L.S.]
Kee-sheswa, or the Sun, his x mark, [L.S.]

Witnesses at signing:

Thomas L. McKenney,
Law. Taliaferro, Indian agent at St. Peter's,
G. W. Kennerly, Indian agent,
A. Baronet Vasques, acting S. I. A. and Int.
Maurice Blondeau,
L. T. Honore,
Jno. W. Johnson,
Meriwether Lewis Clark,
Noal Dashnay.

TREATY WITH THE IOWA, AUGUST 4, 1824, 7 STAT. 231

Articles of a Treaty made and concluded at the City of Washington, on the fourth day of August, one thousand eight hundred and twenty-four, between William Clark,

Superintendent of Indian Affairs, being specially authorized by the President of the United States thereto, and the undersigned Chiefs and Head men, of the Ioway Tribe or Nation, duly authorized and empowered by the said Nation.

ARTICLE 1st. THE Ioway Tribe or Nation of Indians by their deputies, Ma-hos-kah, (or White Cloud,) and Mah-ne-hah-nah, (or Great Walker,) in Council assembled, do hereby agree, in consideration of a certain sum of money, &c. to be paid to the said Ioway Tribe, by the Government of the United States, as hereinafter stipulated, to cede and forever, quit claim, and do, in behalf of their said Tribe, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim, to the lands which the said Ioway Tribe have, or claim, within the State of Missouri, and situated between the Mississippi and Missouri rivers and a line running from the Missouri, at the mouth or entrance of Kanzas river, north one hundred miles, to the northwest corner of the limits of the state of Missouri, and, from thence, east to the Mississippi.

ARTICLE 2d. It is hereby stipulated and agreed, on the part of the United States, as a full compensation for the claims and lands ceded by the Ioway Tribe in the preceding article, there shall be paid to the said Ioway tribe, within the present year, in cash or merchandise, the amount of five hundred dollars, and the United States do further agree to pay to the Ioway Tribe, five hundred dollars, annually, for the term of ten succeeding years.

ARTICLE 3d. The Chiefs and Head Men who sign this Treaty, for themselves, and in behalf of their Tribe, do acknowledge that the lands east and south of the lines described in the first article, (which has been run and

marked by Colonel Sullivan,) so far as the Indians claimed the same, to belong to the United States, and that none of their tribe shall be permitted to settle or hunt upon any part of it, after 1st day of January, one thousand eight hundred and twenty-six, without special permission from the Superintendent of Indian Affairs.

ARTICLE 4th. The undersigned Chiefs, for themselves, and all parts of the Ioway tribe, do acknowledge themselves and the said Ioway Tribe, to be under the protection of the United States of America, and of no other sovereign whatsoever; and they also stipulate, that the said Ioway tribe will not hold any treaty with any foreign powers, individual state, or with individuals of any state.

ARTICLE 5th. The United States engage to provide and support a blacksmith for the Ioway Tribe, so long as the President of the United States may think proper, and to furnish the said Tribe with such farming utensils and cattle, and to employ such persons to aid them in their agriculture, as the President may deem expedient.

ARTICLE 6th. The annuities stipulated to be paid by the second article, to be paid either in money, merchandise, provisions, or domestic animals, at the option of the aforesaid Tribe; and when the said annuities, or any part thereof, is paid in merchandise, it is to be delivered to them at the first cost of the goods at St. Louis, free from cost of transportation.

ARTICLE 7th. This Treaty shall take effect, and be obligatory on the contracting parties, so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

In testimony whereof, the said William Clark, commissioner as aforesaid, and the chiefs and head men of the

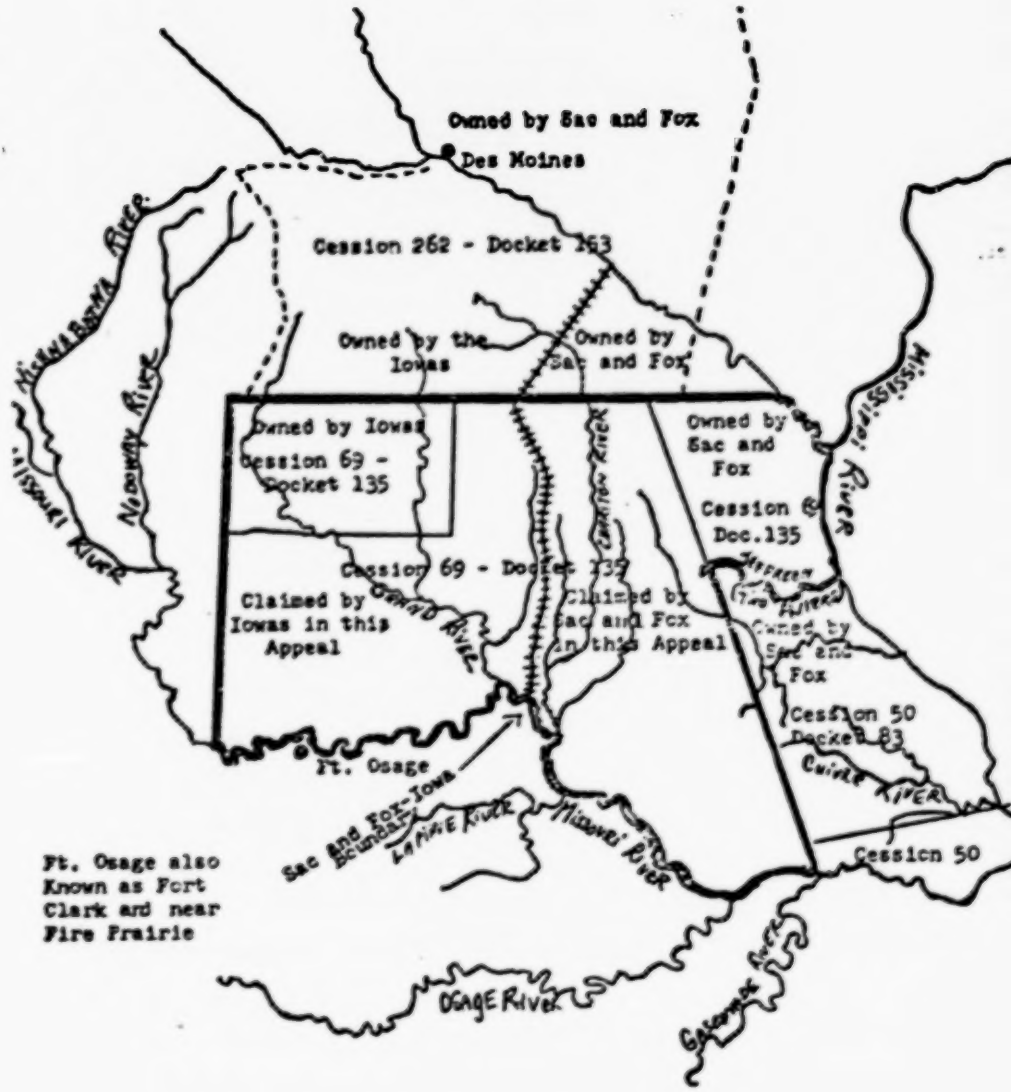
Ioway tribe of Indians, as aforesaid, have hereunto set their hands the day and year first before written.

Wm. Clark,
Ma-hos-kah, (White Cloud,) his x mark,
Mah-ne-hah-nah, (Great Walker,) his x mark.

Witnesses present:

Thos. L. McKenney,
G. W. Kennerly, Indian agent,
Law. Taliaferro, Indian agent at St. Peter's,
A. Baronet Vasques, acting subsistence agent and interpreter,
Meriwether Lewis Clark,
John W. Johnson,
William P. Clark,
William Radford.

APPENDIX B


Owned by Sac and Fox
Des Moines
Cession 262 - Docket 163
Owned by the Iowas
Owned by Sac and Fox
Owned by Iowas
Cession 69 - Docket 135
Owned by Sac and Fox
Cession 69 - Docket 135
Claimed by Iowas in this Appeal
Claimed by Sac and Fox in this Appeal
Owned by Sac and Fox
Cession 50 Docket 83
Ft. Osage
Sac and Fox-Iowa Boundary
Cession 50
Ft. Osage also Known as Fort Clark and near Fire Prairie
OSAGE RIVER
Missouri River
Mississippi River
Nodaway River
Grand River